

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL HIXENBAUGH

Claimant

VS.

EXIDE CORPORATION

Respondent

AND

ZURICH RISK ENTERPRISE MANAGEMENT

Insurance Carrier

Docket No. 231,969

ORDER

Respondent and claimant both appeal from an April 30, 1999 Award by Administrative Law Judge Bruce E. Moore. The Board heard oral argument October 13, 1999.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared on behalf of claimant. John W. Mize of Salina, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant benefits for a 48.5 percent work disability. On appeal, respondent contends the award should be limited to disability based on functional impairment because claimant refused to attempt the accommodated job offered by respondent.

Claimant asks for review of the findings by the ALJ on nature and extent of disability, contending the work disability should be higher. Claimant also contends the ALJ erred in finding August 12, 1996, to be the date of accident. Finally, claimant contends he is entitled to 4.71 weeks of temporary total disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidence and considering the arguments, the Appeals Board concludes the Award should be modified. The Board finds claimant is entitled to 19 percent disability based on functional impairment for accidental injury on April 15, 1996. The Board also finds claimant is not entitled to the temporary total disability requested.

Findings of Fact

1. In March 1996, claimant reported problems with both wrists and his left elbow from his work as an off-loader for respondent. As of April 15, 1996, claimant was on light duty pending medical treatment. On April 22, 1996, Dr. Jeryl G. Fullen performed a left carpal tunnel release, and on May 17, 1996, he performed a right carpal tunnel release.
2. Claimant returned to light duty after the second surgery and remained on light duty until July 28, 1996, when Dr. Fullen released claimant to his regular work. Claimant was also seen in May 1997 by Dr. Ali Manguoglu for a left ulnar nerve problem.
3. After the release to regular work by Dr. Fullen, claimant continued to have both wrist and elbow problems. Because of the continuing problems, claimant returned to Dr. Fullen. Dr. Fullen then suggested it would be best if claimant did not continue in the same job and gave claimant a note to that effect. When claimant gave the note to his supervisor, Mr. Lawrence E. Miles, claimant's supervisor told claimant he would need to get a better definition of what claimant could do and until then would have to continue with his regular job. Claimant did, for a short time, continue with his regular job and attempted to get more detailed restrictions.
4. On August 14, 1996, claimant wrote his supervisor a note stating he could not continue with his regular job. Mr. Miles read the note and advised claimant he would be fired if he did not show up for his regular shift. Claimant did not show up for his regular shift and instead took, that same day, a job at Great Plains. Although claimant denied doing so, this was a job claimant had applied for a week or two earlier. In fact, he had already accepted employment at Great Plains. The Board finds claimant was hired at Great Plains on August 6, 1996, to begin August 12. He took the drug screen test and filled out the W-2 form on August 6. He later called, sometime between August 6 and August 12, and asked that the start date be changed to August 19, 1996.
5. On August 15, 1996, after talking to personnel, Mr. Miles called claimant and told claimant they would find work within claimant's abilities. Mr. Miles did not recall claimant's words but claimant declined the offer. The job would have been at the same rate of pay claimant was receiving with respondent.
6. The Board finds that claimant decided to leave before he knew whether respondent would accommodate his injury and intended to leave regardless of whether respondent would accommodate his injury.
7. Three physicians testified to the extent of claimant's functional impairment—Dr. Gary L. Harbin, Dr. Jeryl G. Fullen, and Dr. Douglas M. Rope. Dr. Harbin, who provided a rating at the request of respondent's counsel, rated the impairment as 5 percent of the whole person for

each extremity. He combined the extremity ratings to a total whole body rating of 10 percent. Dr. Fullen, who had done claimant's surgery, concluded claimant has a whole body impairment of 12 percent. Dr. Rope, who examined claimant at the request of claimant's counsel, rated the impairment as 34 percent of the whole person. The ALJ found the total impairment to be 19 percent, an approximate average of these three. The Board agrees and finds claimant has a functional impairment of 19 percent to the whole body.

8. Claimant has not proven that he was temporarily totally disabled for more than one week.

Conclusions of Law

1. The Board finds the date of accident in this case is April 15, 1996. In *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999), the Kansas Supreme Court reviewed Court of Appeals decisions on date of accident for repetitive trauma injuries. The *Treaster* decision made the date of accident either: (1) when claimant makes a substantial change in his or her job with the same employer because of the injury or (2) when claimant leaves work for that employer because of the injury. In our view, the circumstances of this case do not fit perfectly into the analysis made in the *Treaster* decision. Here, claimant made a substantial change when he was taken off work for surgery. He returned initially to light duty and then unsuccessfully attempted to perform his regular duties. Even though claimant later left the work because of the injury, in our view, the substantial change occurred on April 15, 1996, when claimant was taken off work to have surgery and a temporary unsuccessful attempt to perform the regular job should not change the date of accident. We believe the April 15, 1996 date of accident fits the spirit and intent of the *Treaster* decision.

2. Claimant is not entitled to a work disability. The Board has found that claimant determined to leave his employment with respondent without knowing, and regardless of whether, respondent would have accommodated claimant's injury. The circumstances here seem most nearly analogous to *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, rev. denied ___ Kan. ___ (1998). In that case, the claimant left work without informing the employer she was leaving because of the injury. The evidence established the employer would have accommodated the injury if the employer had known. Under the circumstances, the Court ruled claimant would be treated as earning the wage in the employment she left.

In this case, claimant decided to leave without giving respondent a chance to accommodate the injury. When respondent offered to accommodate, claimant declined. Under these circumstances, the Board concludes the wage in the job claimant was performing should be imputed. Respondent has testified, and the Board finds, the wage in the accommodated job would have been the same.

3. K.S.A. 44-510e provides that claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage. Claimant is, therefore, limited in this case to disability based on functional impairment.

4. In this case, the Board has found claimant has a functional impairment of 19 percent and the Board concludes claimant should receive benefits on that basis.

5. Claimant has not proven he is entitled to temporary total disability benefits. In order to receive temporary total disability benefits for the first week of temporary total disability, a claimant must miss three consecutive weeks. Here, claimant attempts to add together hours missed for medical treatment and claims temporary total disability. A claimant is temporarily and totally disabled if unable to work. Claimant was not temporarily totally disabled during the period claimed. K.S.A. 44-510c.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore on April 30, 1999, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Michael Hixenbaugh, and against the respondent, Exide Corporation, and its insurance carrier, Zurich Risk Enterprise Management, for an accidental injury which occurred April 15, 1996, and based upon an average weekly wage of \$669.45, for 78.85 weeks at the rate of \$326 per week for a 19% permanent partial disability, making a total award of \$25,705.10 which is currently due and owing in one lump sum less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
John W. Mize, Salina, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director